LINDBERG ALEXANDER

IBLA 76-544 Decided July 23, 1979

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F 13397.

Affirmed.

1. Alaska: Native Allotments -- Indian Allotments on Public Domain: Lands Subject to -- Withdrawals and Reservations: Power Sites

   Where an applicant for a Native allotment alleges use and occupancy of lands which had previously been withdrawn in accordance with sec. 24, Federal Water Power Act of June 10, 1920, an application is properly denied despite the fact that a public land order designating the area a power site classification is issued subsequent to the applicant's commencement of use and occupancy. Lands included in an application for power site development under the Act shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, unless otherwise directed by the Federal Power Commission or by Congress.

2. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Rules of Practice: Appeals: Hearings

   A request for a hearing on a Native allotment application will be denied where there are no facts in dispute and the sole question is a legal issue.

APPEARANCES: Carmen Massey, Esq., Henry V. Mitchell, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Lindberg Alexander appeals from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated January 21, 1975, rejecting his application for a Native allotment. The lands sought by appellant are located in secs. 4 and 5, T. 22 N., R. 11 E., and sec. 33, T. 23 N., R. 11 E., Fairbanks meridian, Protraction Diagram No. F2-18, Alaska, 1/ and total approximately 160 acres.

Appellant applied for an allotment in the above lands on December 7, 1970, under the Act of May 17, 1906, 34 Stat. 197, authorizing the Secretary of the Interior

> to allot not to exceed one hundred sixty acres of non-mineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age.

This Act was repealed on December 18, 1971, with the passage of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976), subject to applications pending on that date. 43 U.S.C. § 1617 (1976). Appellant's application alleged his occupancy of the subject lands since September 12, 1964.

By notice dated May 8, 1974, BLM informed appellant that the subject lands were included in application F-030632, filed by the Director, U.S. Geological Survey, on January 9, 1963, to withdraw approximately 8,955,520 acres of public land in Alaska from all appropriations under the public land laws and to classify it for power site purposes as the Rampart Canyon Power Project. The notice further stated that PLO No. 3520 was published in the Federal Register on January 9, 1965, designating this area "Powersite Classification No. 445" (Yukon River near Rampart, Alaska). This classification, dated, January 5, 1965, provided that the lands sought by appellant were to be subject to section 24 of the Federal Water Power

---

1/ The legal description of the land sought by appellant is set forth in his application as follows:

"Beginning on the bank of an unnamed slough at approx. Lat. 66 degrees 46' 03" N., Long. 145 degrees 22' 25" W; thence S 27 chains to corner 2; thence W 40 chains to corner 3 and bank of a second unnamed slough; thence northerly along the bank of the second unnamed slough 22 chains to the junction of the second unnamed slough and an unnamed lake; and corner 4; thence northwesterly along the shore of the unnamed lake to the junction of the unnamed lake and the first unnamed slough; and corner 5; thence easterly along the bank of the first unnamed slough to the point of beginning; contains 160 acres more or less; located Sec. 3 and 4; T23N; R11E; F.M." The discrepancy in section numbers does not affect our decision.

Act of June 10, 1920, 16 U.S.C. § 818 (1976). The notice concluded by granting to appellant 30 days to submit evidence of substantial use and occupancy begun 5 years prior to the filing of application F-030632 on January 9, 1963.

On January 21, 1975, BLM rejected Alexander's application for a Native allotment after finding that no additional evidence had been produced in response to the notice of May 8, 1974.

In his statement of reasons on appeal, Alexander sets forth the following arguments:

1. The guideline announced by the Secretary of the Interior on October 18, 1973, requiring that an applicant complete 5 years use and occupancy prior to withdrawal violates Administrative Procedure Act (APA) requirements for promulgating a rule.

2. The requirement that an applicant complete 5 years use and occupancy prior to withdrawal applies only to allotments within national forests.

3. The operative date of withdrawal is the date on which PLO No. 3520 was published in the Federal Register.

4. Due process requires a hearing prior to final rejection of a Native allotment.

The guideline to which appellant refers in his first two arguments on appeal was announced by the Secretary on October 18, 1973, through Jack O. Horton, Assistant Secretary, Land and Water Resources. It stated in part: "2. Where a Native has not completed the five-year period of occupancy of lands prior to the effective date of a withdrawal or reservation of lands, the allotment application should be rejected." (Emphasis supplied.)

Appellant challenged the validity of the guideline by alleging a failure to comply with the requirements of the Administrative Procedure Act for promulgating a rule. 5 U.S.C. § 553 (1976). We need not pass on this question, however, for two reasons:

1. The guideline has been rescinded by Secretarial Order No. 3040, dated May 25, 1979.

2. Appellant does not allege use and occupancy of the subject lands until September 12, 1964, some 20 months after application F-030632 was filed by the Director, U.S. Geological Survey, to withdraw the subject land and classify it for power site purposes.

[1] Appellant's use and occupancy did, however, precede the publication date of PLO No. 3520. PLO No. 3520 classified the lands sought by appellant subject to section 24 of the Federal Water Power

Act of June 10, 1920, supra. Appellant argues that the publication date of PLO No. 3520, January 9, 1965, is the effective date of the withdrawal of the lands at issue, and hence that his use and occupancy of the lands was begun prior to withdrawal.

This argument overlooks the plain language of the Federal Water Power Act of June 10, 1920:

> Any lands of the United States included in any proposed projection under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by the Congress.

16 U.S.C. § 818 (1976). See also 43 CFR 2091.2-5 (1978).

The lands sought by appellant were subject to the provisions of section 818 on January 9, 1963, upon the filing of application F-030632 by the Director, U.S. Geological Survey. Herman Joseph, 21 IBLA 199 (1975), Civ. No. F 76-20 (D. Alas.). Appellant's use and occupancy commenced after that date was unauthorized and constituted a trespass. Native occupancy commenced at a time when the land is not subject thereto gives rise to no rights. Donald E. Miller, 2 IBLA 309, 314 (1971).

[2] In his final argument on appeal, Alexander cites to us the recent decision, Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), wherein the court of appeals held that an applicant for a Native allotment had a sufficient property interest to warrant due process protection. Appellant asserts that his due process rights were denied because no oral hearing was held prior to BLM's rejection of his application.

Following the Pence decision set forth above, the court found in Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), that the Department's use of its contest procedures, published at 43 CFR 4.451 to 4.452-9 (1978), provided adequate due process protection of an applicant's property interest. Therein, the court approved our statement in Donald Peters, 24 IBLA 235, 241 n.1 (1976), that BLM may reject a claim without a hearing where it determines that the application must be rejected as a matter of law.

The Department has consistently held that no evidentiary hearing is necessary where there are no facts in dispute and the sole question is a legal issue. Mable Melovedoff, 29 IBLA 250 (1977); Sarah F. Lindgren, 23 IBLA 174 (1975); Ann McNoise, 20 IBLA 169 (1975). Appellant's request for a hearing is accordingly denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge